IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Original, No. .

EX PARTE: IN THE MATTER OF RAMON BAEZ, PETITIONER.

BRIEF FOR PETITIONER IN REPLY.

The brief submitted by the Solicitor General in this case has the merit of relieving the question presented by the petitioner from any possible trace of confusion or ambiguity, for when it is read in connection with the brief heretofore presented by the petitioner, they will be found to be in absolute agreement and accord upon every fact necessary to be considered by this court in deciding upon the propriety of allowing the question at issue to be fully argued before it is decided. The facts thus clearly presented and admitted are:

First. That this Government has had absolute and exclusive sovereignty over and ownership of the island of Porto Rico since April 11, 1899, the day of the promulgation of the treaty of peace between this Government and the government of Spain.

Second. That since that date a condition of absolute and undisturbed peace has existed and still exists in the island of Porto Rico.

Third. That since the date of that treaty the local tribunals for the administration of civil and criminal justice existing before such cession have been discharging their proper functions, and from that date until the present there has been no action by the legislative department of this Government establishing any other or different tribunals for the administration of justice, either civil or criminal.

The brief submitted by the Solicitor General asserts that a military officer, with the assent of the Secretary of War and the President, may, long after such cession and the declaration of peace, promulgate a code of civil and criminal law governing all persons then upon the island of Porto Rico, and may establish a tribunal composed of persons designated by him for that purpose, which tribunal so established may, subject to his approval, conduct trials in any manner he prescribes and inflict any punishment he judges expedient, and from the judgment of such tribunal, established in a time of profound peace, there can be no appeal except such as he allows.

This contention is distinctly traversed by the petitioner, who alleges that, being within the exclusive authority, control, and sovereignty of the Government of the United States, upon a territory exclusively belonging to it, in a time of profound peace, and in a country where the ordinary tribunals for the administration of justice are discharging their functions, he is not subject to the arbitrary will of any officer of the army, or of the Secretary of War, or of the President of the United States.

It will be observed that the issue thus distinctly and clearly presented does not properly involve any other question than the one it presents.

It may be true or it may not be true that the inhabitants of Porto Rico are now aliens or citizens of the United States or occupy an anomalous position as having no country; but in whatever category of citizenship such inhabitants may be is a question not involved in the present controversy.

It may be true or it may not be true that the inhabitants of Porto Rico are entitled to "the immunities and privileges" of the other inhabitants of the territory of the United States so far as concerns the laws regulating the imposition of customs duties or of internal-revenue taxes; but whether they are or are not so entitled is a question not involved in the present controversy.

It may be true or it may not be that Congress possesses with respect to the island of Porto Rico precisely the same unlimited, uncontrolled, and absolute power which the Czar of Russia possesses with respect to the last khanate conquered by him in Asia, so that Congress, like the Czar, may establish in Porto Rico a monarchy, with the systems of slavery and polygamy and a State church, and in every respect deal with the inhabitants of that island free from any limitation whatever upon its power; but that question is also a question not involved in the present controversy.

On April 11, 1899, the island of Porto Rico became an integral part of the territory of the United States, quite as much so as any other foot of its territory. Nearly three months thereafter, on June 27, 1899, without a pretense of any disturbance of the absolute peace which had continuously existed and still exists in the island, Brigadier General Davis assumed to establish a military tribunal; to give to it jurisdiction over all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution "and to all common-law offenses

within the restrictions therein specified," and to declare that the members of such tribunal, arbitrarily appointed by him, "shall be clothed with the powers vested in the judges of the circuit or district courts of the United States." A copy of General Orders No. 88 of June 27, 1899, establishing such tribunal, is hereto appended as Appendix A.

It is only just to Brigadier General Davis to state that in the ninth paragraph of these orders he was gracious enough to allow "any party litigant aggrieved by the judgment or decree of his appointees a stay of ninety days 'for the purpose of allowing such party to make application to the Supreme Court of the United States for a writ of certiorari or other suitable process to review such judgment or decree.'" And in the twelfth paragraph he declares that *he* "will exercise the power of pardon, commutation or mitigation of punishment in criminal cases."

It will be observed that the right of Brigadier General Davis to arrest, try, and punish any inhabitant of Porto Rico according to his own will or pleasure is practically unlimited as to time, for if he can establish such a tribunal three months after the island became a part of the territory of the United States and in a time of profound peace, he can, of course, do so as well three years from that date, provided Congress and the President continue to leave the government of the island in his hands.

It does not seem to us to require elaborate argument or the citation of many authorities to satisfy this court that the proposition thus clearly affirmed by the Solicitor General on the one side, and as clearly denied by the petitioner on the other, is a question of sufficient gravity and importance to justify this court in listening to an argument upon it.

Indeed, it is not thought by us to be possible that the inhabitants of Porto Rico, three months after peace has been

declared and the island has been in the peaceable possession of the United States, are still subject to the arbitrary judgment of military officers designated by a brigadier general and whose functions and duties are defined by him.

JURISDICTION.

The jurisdictional power of this court to issue writs of *habeas corpus* is not, as suggested by the learned Solicitor General, confined to cases which may be subject to review by the court on writ of error or appeal.

The decisions of courts-martial cannot be reviewed by this court on writ of error or appeal, yet the power of the court in an original proceeding to inquire into the legality of a detention under a court-martial sentence has never been seriously doubted.

Ex parte Reed, 100 U. S., 13.
Ex parte Mason, 105 U. S., 696.

In *Ex parte* Wilson (114 U. S., 417) it was said by Mr. Justice Gray (p. 420):

"It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court, *or there is no authority to hold him under the sentence.*"

The true extent of the power and duty of the court in such cases is well defined in *Ex parte* Terry (128 U. S., 289, 301), as follows:

"There can be no dispute either as to the power or duty of this court in cases of this character. Its power to issue a writ of *habeas corpus* for the purpose of inquiring into the cause of the restraint of the liberty of the person in whose

behalf the writ is asked, is expressly conferred by statute, and *extends to the cases, among others, of prisoners in jail under or by color of the authority* of the *United States*, and of persons who are in custody in violation of the Constitution or laws of the United States." * * * "Its general duty in such cases is also prescribed by statute." * * * Upon complaint duly verified * * * "it is the duty of the court to 'forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto'" (Rev. Stats. U. S., 751–755).

It clearly appears from the petition in the pending case that petitioner is confined under or by color of authority of the United States. It is contended by him that such confinement is in violation of the Constitution and laws of the United States.

Whatever may be the political status of the island of Porto Rico and of its inhabitants, it cannot reasonably be contended that it and they are not embraced within the territorial sovereignty of the United States. Of the courts of the United States, this court alone has general powers co-extensive with the national territory.

If this court has not power to grant writs of *habeas corpus* to inquire into the authority of the Provisional Court of the Department of Porto Rico, no other court of the United States possesses it.

For this reason the proceedings are addressed to the court as an original matter and not by way of appeal.

The learned Solicitor General asserts that "the so-called courts [in Porto Rico] are mere agencies of the military power. * * * No provision whatever has been made for extending the judicial power of the United States over Puerto Rico."

If in the latter sentence he refers alone to rightful legislative provision, we readily yield assent, but it is not true

that *no provision whatever* for extending that judicial power has been made.

General order 88 (Appendix) establishing the provisional court declares (sec. II) that its powers "shall extend to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution, and to all common-law offenses within the restrictions hereinafter specified."

Section III of said General Order recites Article III, section 2, par. 1, of the Federal Constitution, and section IV provides that the provisional court "shall follow the principles of common law and equity as established by the courts of the United States, and its procedure, rules, and records shall conform as nearly as practicable to those observed and kept in said Federal court. Section XI provides for "writs of certiorari or other suitable process" from the Supreme Court of the United States to review its judgments or decrees.

That the provisional court, backed by the military power of the United States, is exercising the functions and powers thus conferred upon it will not be denied. With the Insular courts, established under Spanish rule, administering existing laws in the island and capable of protecting the inhabitants in their persons and property as they have for so many years protected them, it is folly to contend that the provisional court was a military necessity. Its establishment evidences a distinct attempt by the executive branch of the Government, acting through the military authorities, to extend the judicial power of the United States in the absence of legislative enactment. It was just such an attempt as this that was rebuked by this court in Jecker *vs.* Montgomery (13 How., 498, 515), where Mr. Chief Justice Taney, speaking for the court, said:

"Under the Constitution of the United States the judicial power of the General Government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the

United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. *And neither the President nor any military officer* can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations."

To the extent that circuit and district courts of the United States have jurisdiction to pass upon the rights of parties to prize cases or to administer the laws of nations, to such extent also has the provisional court of the department of Porto Rico like jurisdiction under the order of Brigadier General Davis, and in addition this court has jurisdiction (sec. VIII) over "all offenses punishable under the statutory laws of the United States, such as those indicated in paragraph I of this order."

Does not this indicate at least a *willingness* on the part of the military authorities, in the absence of legislation by Congress, to extend the statutory laws of the United States over this newly acquired territory?

II.

The provisional court was without warrant of law for its existence. Its sentences do not result from or in *due process* of law. Having no jurisdictional power over petitioner, its sentence condemning him to be restrained of his liberty is void. This results irrespective of the question as to character of the offense with which he is charged and particularly without regard to whether it be "infamous" or otherwise.

This court has never ruled that imprisonment at hard labor in jail was not equally infamous with like imprisonment in a "State jail" or penitentiary. Wherein imprison-

ment at hard labor in an insular or territorial jail would differ in infamy from like imprisonment in a "*State* jail" is not disclosed by the brief for the United States.

"For more than a century, imprisonment at hard labor in the State prison or penitentiary or *other similar institution* has been considered an infamous punishment in England and America."

Ex parte Wilson, 114 U. S., 417, 428.

Sir William Blackstone classes among the punishments "that consist principally in their ignominy," "hard labor, *in the house of correction* or otherwise."

Besides, the test of whether a crime is infamous consists in the character of the punishment that may or might be imposed upon the offender, and is not measured by that which is actually imposed.

"When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put to trial except on the accusation of a grand jury."

Ex parte Wilson (*supra*).

It is admitted in the brief for the United States (p. 7) that there is a penitentiary at Ponce, and there is nothing in the general order prescribing the crime with which petitioner is charged and its punishment which indicates a preference for the incarceration of the accused in one of the jails rather than in the penitentiary.

The fact that in the sequel the jail proved to be the more convenient receptacle is of no consequence.

Though the constitutional guarantees relating to grand and petit juries do not apply to States (Maxwell *vs.* Dow 176 U. S., —), it is well settled that they do apply to Territories (Thompson *vs.* Utah, 170 U. S., 343) and all other

places over which the United States exercise exclusive jurisdiction (Callan *vs.* Wilson, 127 U. S., 540).

It is respectfully submitted that upon the showing made in the petition and upon the principles enunciated in *Ex parte* Terry (*supra*), the writs prayed for should issue forthwith.

FREDERIC D. McKENNEY,
FRANCIS H. DEXTER,
For the Petitioner.

WAYNE MACVEAGH,
Of Counsel.

APPENDIX.

A.

EXHIBIT D.

General Orders No. 88.

HEADQUARTERS DEPARTMENT OF PORTO RICO,
SAN JUAN, *June 27th*, 1899.

I. In view of existing and steadily increasing legal business requiring judicial determination, which does not fall within the jurisdiction of the local insular courts, such as smuggling goods in evasion of revenue laws, larceny of United States property, controversies between citizens of different States and of foreign States, violation of the United States postal laws, &c., &c., and pursuant to authority from the President of the United States, conveyed by endorsement of April 14th, 1899, from the acting Secretary of War, and after full conference with the supreme court and members of the bar of the island, a United States provisional court is hereby established for the department of Porto Rico.

II. The judicial power of the provisional court hereby established shall extend to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution, and to all common-law offenses within the restrictions hereinafter specified.

III. Art. III, sec. 2, paragraph 1, of the Constitution is as follows:

> "1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States;

between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

IV. The decisions of said court shall follow the principles of common law and equity as established by the courts of the United States, and its procedure, rules and records shall conform as nearly as practicable to those observed and kept in said Federal courts. Its terms and places of sitting shall be fixed by the court at such times and places as may be most convenient for the parties litigant and to insure the expeditious transaction of business.

V. The provisional court shall consist of three judges, one of whom shall be known as the law judge, and the other two as associate judges; one United States district attorney, one marshal, one clerk, three deputy clerks, one stenographer and reporter, one interpreter, one bailiff and janitor, and one messenger. The law judge shall preside and shall determine and decide all technical questions of law. A majority vote of the bench shall determine all questions of fact. The jury system may be introduced or dispensed with in any particular case, in the discretion of the court.

VI. The judges of the provisional court shall be clothed with the powers vested in the judges of the circuit or district courts of the United States.

VII. The district attorney shall be authorized to present to the court informations against all parties for violations of United States statutes and regulations. He shall also in like manner present informations for violations of orders issued by the department commander, relating to civil matters, which may be referred to him from these headquarters. It shall also be his duty to represent the United States in all suits to which it is a party, and to perform such other duties as usually pertain to the district attorneys in the Federal courts of the United States.

VIII. In order to define more clearly certain branches of the criminal jurisdiction of the provisional court, it is hereby provided that it shall include and be exclusive in the following classes of cases:

1st. All offences punishable under the statutory laws of the United States, such as those indicated in paragraph I of this order.

2d. Offences committed by or against persons, foreigners, or Americans, not residents of this department, but who may be travelling or temporarily sojourning therein, or against the property of non-residents.

3d. Offences against the person or property of persons belonging to the army or navy or those committed by persons belonging to the army or navy, not properly triable by military or naval courts, but not including minor police offences.

4th. Offenses committed by or against foreigners or by or against citizens of another State, district, or Territory of the United States residing in this department.

IX. Cases arising under article XI of the treaty of peace between the United States and Spain will be determined as therein provided.

X. In civil actions when the amount in controversy is fifty *dollars* ($50) or over, and in which any of the classes of persons above enumerated in paragraph VIII are parties, or in which the parties litigant by stipulation invoke its jurisdiction, shall be brought in the provisional court: *Provided*, That in the determination of all suits to which Porto Ricans are parties, or of suits arising from contracts which have been or shall be made under the provisions of Spanish or Porto Rican laws, the court shall, as far as practicable, conform to the precedents and decisions of the U. S. courts in similar cases which have been tried and determined in territory formerly acquired by the United States from Spain or Mexico. In all other civil actions the case shall lie within the jurisdiction of the proper insular court as now provided by local law.

XI. If any party litigant shall feel aggrieved by the judgment or decree of said court, a stay of ninety days shall be granted such party before the execution of such judgment or decree, upon the filing of a bond by him with sureties in an amount and with such conditions as the court may determine, for the purpose of allowing such party to make application to the Supreme Court of the United States for a writ of certiorari or other suitable process to review such judgment or decree; but if at the end of said ninety days such process has not been issued by the Supreme Court execution shall forthwith issue.

XII. The department commander will exercise the power

of pardon, commutation, or mitigation of punishment in criminal cases.

XIII. All fees, fines, and costs paid to the clerk of the provisional court shall be turned over by him at the end of each calendar month to the treasurer of the island with a statement of the sources from which they are received.

XIV. Members of the bar of Porto Rico will be admitted to practice in the provisional court upon presentation of a certificate signed by the president of the supreme court of Porto Rico certifying to their professional standing.

XV. All lawyers practicing in the provisional court who are unfamiliar with the English language shall be permitted upon application to use their own interpreter when addressing the court.

XVI. The court shall adopt an appropriate seal which will be procured by the treasurer of the island. The clerk of the court shall have the custody of the seal for use in attesting legal documents in the usual manner.

XVII. In accordance with the provisions of paragraph V, of this order, the following appointments are announced to take effect July 1st, 1899:

To be Law Judge,

Noah Brooks Kent Pettingill.

To be Provisional United States Attorney,

J. Marbourg Keedy.

The following officers are hereby detailed on the special duty set opposite their respective names:

Major *Eugene D. Dimmick*, 5th U. S. Cavalry,
Major *Earl D. Thomas*, 5th U. S. Cavalry,
} Associate Judges of the U. S. Provisional Court.

1st Lieutenant *Robert Alexander*, 11th U. S. Infantry,
} Clerk of the U. S. Provisional Court.

Private *Samuel C. Bothwell*, Troop D, 5th U. S. Cavalry, is detailed on special duty as marshal of the United States provisional court.

The necessary deputies will be detailed in subsequent orders.

The officers named will proceed to San Juan and report to the adjutant general of the department.

The travel enjoined is necessary for the public service.

By command of Brigadier General Davis:

W. P. HALL,
Adjutant General.